

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JULIE ANN COOK</b>	)	
Claimant	)	
VS.	)	
	)	
<b>SAUER-DANFOSS, INC.</b>	)	Docket No. 1,004,800
Respondent	)	
AND	)	
	)	
<b>SENTRY INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the April 13, 2004 Award of Administrative Law Judge Brad E. Avery. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to prove that she had suffered accidental injury arising out of and in the course of her employment. The Workers Compensation Board (Board) heard oral argument on August 10, 2004.

**APPEARANCES**

Claimant appeared by her attorney, Chris Miller of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Janell Jenkins Foster of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

**ISSUES**

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment on the dates alleged?

- (2) Is claimant entitled to temporary total disability compensation for the period December 5, 2002, to February 6, 2003?
- (3) Is claimant entitled to unauthorized and future medical treatment?
- (4) What is the nature and extent of claimant's injury and disability and what is the amount of compensation due?

Respondent originally disputed that claimant provided timely notice of accident. However, at oral argument to the Board, the parties acknowledged that the issue of timely notice was no longer in dispute. Additionally, the parties acknowledged that while the ALJ did not decide all of the issues before it, the parties agreed that if the Board reversed the ALJ on the issue of causation, a remand to the ALJ would not be necessary, with the Board being asked to determine the remaining issues based upon the entire record.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant alleges injury through a series of accidents beginning June 20, 2001, through December 5, 2002, as a result of her forklift driving responsibilities with respondent. Claimant testified that in June 2001, she began experiencing a cold feeling and numbness in her foot. She believed that it was caused by her driving the forklift. Claimant advised respondent and was sent to a series of health care providers, who treated claimant conservatively over a period of many months. The health care providers included Chris D. Fevurly, M.D., board certified in internal medicine and occupational medicine, who examined claimant on two occasions beginning in March 2002. Dr. Fevurly provided claimant with conservative treatment which proved to be less than beneficial. Dr. Fevurly, when asked whether claimant's job duties caused or were the source of her problems, testified that it was unlikely that her pain was related to her job duties.

Claimant was also referred to Vito J. Carabetta, M.D., board certified in physical medicine and rehabilitation. Dr. Carabetta examined claimant in October of 2002, diagnosing low back pain and right sciatica. Dr. Carabetta was also of the opinion that claimant's work activities were not the source of her problems. He determined that claimant had underlying degenerative disc disease, which he did not believe was caused or aggravated by her job duties.

There was a discrepancy in the record regarding the job duties performed by claimant. There was testimony that the forklift claimant rode on caused significant vibrations, which would aggravate her condition. Additionally, claimant testified that she repetitively lifted 40 to 50 pounds on a regular basis. This testimony was contradicted by Jake Trybom, respondent's safety coordinator. Mr. Trybom was also the person responsible for training the forklift drivers and drove a forklift on an occasional basis if there was a shortage of forklift drivers on the warehouse floor. He testified that claimant stood on a spongy mat when driving the forklift and that the floor of the warehouse was smooth, causing no vibration. Additionally, he testified that claimant would only occasionally lift up to 40 pounds, estimated to be six times per day.

Claimant was examined on two occasions by Edward J. Prostic, M.D., a board certified orthopedic surgeon, at the request of her attorney. From the first examination in July of 2002, Dr. Prostic opined that claimant had an S1 radiculopathy from degenerative disc disease at L5-S1. He testified that claimant's condition was aggravated and contributed to by the work she performed for respondent, opining that he had been advised that riding on a standup forklift involved significant vibration of the spine. He testified that a combination of the vibration from the forklift and the repetitious lifting of objects up to 40 pounds would aggravate claimant's condition. When asked to define what he meant by repetitious, Dr. Prostic became evasive, testifying that he only meant more than one time per shift. In opining that claimant had suffered an 18 percent impairment to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), Dr. Prostic utilized the range of motion model because he considered this to be a repetitious trauma to her low back.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> In this instance, the Board finds that the testimony of Dr. Fevurly, when combined with that of Dr. Carabetta, is more persuasive regarding what may have caused or aggravated claimant's ongoing symptoms. The Board finds claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment.

The Board acknowledges that claimant was referred to Sergio Delgado, M.D., a local orthopedic surgeon, for an independent medical examination on July 8, 2003, as requested by the ALJ. However, Dr. Delgado's opinion regarding causation does not specifically address the question of whether claimant's work activities were responsible for claimant's impairment.

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

The Board finds that the determination by the ALJ that claimant has failed to prove she suffered personal injury by accident arising out of and in the course of her employment with respondent should be affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated April 13, 2004, should be, and is hereby, affirmed in all regards.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director